In The

Supreme Court of the United States

October Term, 1978

No. 78-393

WILLIAM LOUIS PIERCEALL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at ....., Va. ....., 243 S.E.2d 222 (1978) and is set forth in petitioner's Appendix at 6a-16a.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Petitioner claims the following issues are presented by the case.

I. Were The Fruits Of The Search Conducted On April 19, 1976, Seized Pursuant To A Warrant Issued Without Probable Cause And Admitted Into Evidence Contrary To The Fourth And Fourteenth Amendments?

A. Does the informant's tip upon which probable cause purports to rest conform to the *Aguilar-Spinelli* test?

B. Has the conflict between *Harris* v. *United States* and *Spinelli* v. *United States* as to the use of criminal reputation allegations created confusion and conflict in state and lower federal courts and did the court below properly give weight to such allegations?

STATEMENT OF THE CASE

On July 8, 1976, the Honorable James Keith, of the Circuit Court of Prince William County, Virginia, sitting alone, overruled William L. Pierceall's Motion to Suppress certain evidence seized during the search of Mr. Pierceall's home on April 19, 1976. Mr. Pierceall was convicted of the manufacture or production of marijuana, the possession of amphetamine with intent to distribute, the possession of marijuana with intent to distribute, and the possession of cocaine as charged in three indictments. A fourth indictment was dismissed. (Appendix, Supreme Court of Virginia, at 1-5, 24-25, 36-38).

On January 13, 1977, the Court denied Mr. Pierceall's motion for new trial, made on January 11, 1977. (Appendix 34-35).

On January 27, 1977, Mr. Pierceall was sentenced to fifteen years confinement in the State Penitentiary, with ten years suspended, on each indictment, the sentences to run concurrently. Final judgment orders were entered on that date. (Appendix 36-47). An appeal to the Supreme Court of Virginia was duly noted and on October 11, 1977, that court

granted a writ of error limited to the question of the sufficiency of the affidavit offered in support of the search warrant. On April 21, 1978, the Supreme Court of Virginia affirmed the judgment of the Circuit Court of Prince William County in a written opinion. On June 9, 1978, the Supreme Court of Virginia denied Mr. Pierceall's petition for rehearing. The order granting the writ of error, the opinion of the Supreme Court of Virginia, and the order of that court denying the petition for rehearing are set forth in the Appendix to the Petition for Writ of Certiorari at 3a, 6a-16a, and 17a, hereinafter (P.App. at .....).

STATEMENT OF FACTS

On April 19, 1976, certain law-enforcement officers of Prince William County executed a search warrant at 13401 Kingsman Road, Woodbridge, Prince William County, Virginia. The petitioner was arrested on the premises and certain items were seized which resulted in the charges and convictions noted above.

The basis for the warrant was a sworn affidavit of investigator R. L. Bennett, which is set forth in full in the Petition for Writ of Certiorari at 4-10.

ARGUMENT AGAINST THE GRANTING OF WRIT OF CERTIORARI

I.

The Affidavit Submitted In Application For A Search Warrant Met The Test Set Forth In Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

The petitioner admits that the Supreme Court of Virginia properly considered the search warrant on the common sense reading of the affidavit. See *United States* v. *Ventresca,*

380 U.S. 102 (1965). The complaint is not founded in that court's consideration, but, rather only in the result.

The petitioner does not dispute that the affidavit clearly contains information sufficient to permit the magistrate to judge the informant's credibility, the second part of the *Aguilar-Spinelli* test. Rather, he attacks the warrant upon an alleged insufficiency of " 'some of the underlying circumstances necessary to enable the magistrate to judge the validity of the informant's conclusion that the narcotics were in [his] home.' " (Petition for writ of certiorari at 13). The specific defect alleged is that the affidavit does not indicate that the last tip, given within the twenty-four hour period preceding the warrant's issuance and execution, was the product of the informant's personal observation. The Virginia Supreme Court, however, noted that the informant had made a controlled buy of marijuana at Pierceall's residence on November 15, 1975, and afterward reported to the affiant that "approximately a pound of marijuana was in the house and that 'at least fifty marijuana plants' were being grown by Pierceall in a bedroom." (P.App. at 14a). The court further noted that the affidavit related a long investigation into the case, including detailed reports from fellow officers and from Pierceall's employees. (P. App. at 15a). Recognizing that some of the information consisted of unconfirmed rumors, the court found that, standing alone, the allegation of November 15, 1975 was insufficient to support probable cause on April 19, 1976. (P. App. at 15a, 12a). The significance of the earlier information, however, was that a pattern of criminal activity by the petitioner was shown. Noting from an earlier opinion, the court found that the " 'common sense conclusion' to be drawn . . . was that the pattern probably was continuing at the time of the affidavit, that it would probably continue until the warrant

was executed, and that the drugs would probably be found at that time." *Huff* v. *Commonwealth,* 213 Va. 710, 717, 194 S.E.2d 690, 696 (1973) (P.App. at 15a). This conclusion is certainly buttressed by the firm representation made by the reliable and unchallenged informant that within the preceding twenty-four hours certain specific items of contraband were in petitioner's home. The court concluded that, as this tip was given by the same individual who participated in the controlled buy, it was reasonable to infer that it was based upon personal observation. It is most significant that at no point has petitioner attacked the *Huff* rationale.

As noted above, this Court has recognized that a determination of probable cause should be based upon a "common sense reading of the entire affidavit." *Spinelli* v. *United States,* 393 U.S. at 415; *United States* v. *Ventresca,* 380 U.S. at 108. Petitioner attempts to rebut the state supreme court's reading of the affidavit by reference to *United States* v. *Karathanos,* 531 F.2d 26 (2nd Cir.), *cert. denied,* 428 U.S. 910 (1976). That case involved a prosecution under 8 U.S.C. § 1324 for harboring illegal aliens. The affidavit was in part the product of statements made by an informant who was himself an alien and who lived in close quarters with the alleged illegal aliens in the defendant's restaurant. That court noted, however, that the informant had no way of knowing whether the persons so described were in fact illegally in this country. The court went on to discuss the differences in language between the different aliens and the natural disinclination to admit such a status, both of which would enhance the probability that the informant's statements were mere speculation. The court further noted that the affidavit was void of any names or nationalities of the persons allegedly harbored. The court

concluded that the source's statements could just as well be conclusions, stating "The fact that the co-workers were boarded in the basement [of the defendant's restaurant] is not inconsistent with traditional employers' past treatment of low-paid lawfully admitted immigrants." 531 F.2d at 30-31. The crime was not in harboring aliens, only those illegally in this country. Without any corroboration the magistrate would have to assume that the persons referred to by the affiant in *Karathanos* were within that status contemplated by the statute. As the criminality of the act itself had to be inferred, without support from the rest of the affidavit, the conviction was reversed. In the instant case, the criminality of petitioner's acts need not be presumed as the substances described obviously constituted contraband.

The affidavit found insufficient in *Spinelli* merely recited observations of petitioner's movement between several apartment buildings and contained the claim that one such apartment frequented by Spinelli contained two telephones. Additionally, the representation was made that Spinelli was known to be a bookmaker, a gambler, and an associate of bookmakers and gamblers. The informant's tip merely stated that Spinelli was operating a bookmaking operation with the two telephones. This Court found "nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." 393 U.S. at 418. As is readily apparent, the affidavit in the instant case clearly contains support for the magistrate's conclusion that Pierceall was engaged in criminal activity of the kind and place alleged in the affidavit.

II.

The Petitioner Has Failed To Demonstrate That Significant Conflict Exists Between Harris v. United States And Spinelli v. United States Or That The Virginia Supreme Court Improperly Considered Criminal Reputation In The Present Case.

In the instant case petitioner claims that the Virginia Supreme Court improperly considered an allegation of criminal reputation in evaluating the sufficiency of the affidavit. Petitioner specifically makes the allegation that "an individual with whom the defendant was seen on the date the warrant was issued was 'a known drug user and is presently known to be active in the drug scene' " was improperly considered. (Petition at 18). Petitioner asserts that such language is indistinguishable from that considered and rejected by this Court in *Spinelli.* As noted above, nothing in the *Spinelli* affidavit buttressed the informant's report that a crime was probably being committed. Without any such support, the allegation that Spinelli was "known" as a gambler and an associate of gamblers was properly dismissed as mere suspicion. In the instant case, however, the Virginia Supreme Court determined that "probative value may be accorded the officer's statement that he had observed Pierceall, on the very date that application for the warrant was made, in the company of a man known to the affiant as a drug dealer, where the statement *was supported by the fact that Rowe [the man] had previously been convicted of two counts of selling marijuana.*" (P. App. at 15a) (emphasis added). The critical distinction is obvious. While the affiant's suspicion in *Spinelli* was not supported by any evidence, the officer's allegation in the instant case is underscored by Rowe's conviction of two counts of selling marijuana.

Spinelli certainly has not been overruled by *United States* v. *Harris,* 403 U.S. 573, 580-583 (1971). The Virginia

Supreme Court recognized this fact, for nothing in the opinion from that court indicates that a consideration of Rowe's reputation was the controlling factor in the decision. Rather, the court gave the affiant's statement "probative value" only because it was supported by Rowe's previous conviction. *Guzewicz* v. *Commonwealth,* 212 Va. 730, 187 S.E.2d 144 (1972) can easily be distinguished in that the affiant merely claimed the premises to be searched were " 'frequented by persons known to him to be unlawful users of controlled drugs' " without corroboration. (P. App. at 14a). In the case at bar, the informant related that a substantial quantity of particularized drugs and related paraphernalia were present in petitioner's home within the twenty-four hour period prior to issuance of the warrant. The fact that petitioner is observed in the company of a convicted drug seller on the very date the warrant is executed clearly lends support to a fair reading of the affidavit that criminal conduct probably is continuing. Therefore, the *Spinelli* and *Guzewicz* situations are clearly distinguishable from the instant case.

As to petitioner's claim that certain courts have perceived part II of *Harris* to be binding, an examination of those cases cited reveals this claim to be without merit. In neither of these cases was *Harris* cited as controlling, nor did the disposition of the cases turn upon a question of criminal reputation. *United States* v. *Crawford,* 462 F.2d 597 (9th Cir. 1972) was a case in which the second prong of the *Aguilar-Spinelli* test was attacked. After sustaining the affidavit and affirming the conviction, the court, in dictum, noted that the affiant should have related more details of his contact with the informant which caused him to conclude reliability. *Harris* was cited almost in passing and clearly was not crucial to the outcome of the case. *United States* v. *Crawford,* 462 F.2d at 599. Similarly, in *United*

States v. *Marshall,* 526 F.2d 1349, 1356-1357 (9th Cir. 1975), the affidavit was corroborated by independent investigation. The reputation of the co-defendant's husband, who was on parole for a heroin violation, was considered, but not controlling. *See also United States* v. *Dauphinee,* 538 F.2d 1, 4 (1st Cir. 1976); *United States* v. *Kemp,* 421 F.Supp. 563, 566 (W.D. Pa. 1976). It is clear from an examination of these cases that *Harris* is not creating the confusion petitioner has alleged. The petitioner's reliance on *Karathanos* is misplaced, for the reasons stated above.

A careful reading of these decisions reveals that petitioner's claim of substantial conflict is unfounded.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Herring, Jr., Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 24th day of November, 1978, I mailed with first-class postage prepaid a true copy of this Respondent's Brief in Opposition To Granting of Certiorari to T. Brook Howard, Esquire, and Jack S. Rhoades, Esquire, Howard, Stephens, Lynch, Cake and Howard, 128 North Pitt Street, Alexandria, Virginia 22314.

ROBERT H. HERRING, JR.
Assistant Attorney General